No. 77-1254

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

CYRUS R. VANCE, SECRETARY OF STATE, ET AL.,
Appellants

v.

HOLBROOK BRADLEY, ET AL.,
Appellees

On Appeal from the United States District Court for the District of Columbia

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AMICUS CURIAE BRIEF OF AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFL-CIO) IN SUPPORT OF APPELLEES

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PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 42, consent of the parties having been obtained, the American Federation of Government Employees files this Brief as *amicus curiae* in support of the Appellees.

INTEREST OF THE AMICUS CURIAE

The American Federation of Government Employees ("AFGE") is an unincorporated association and labor union representing approximately 700,000 civilian employees of the federal government. These employees work in every major department and agency, and are assigned throughout the world. Within the foreign affairs agencies, AFGE holds exclusive recognition for approximately 2200 Foreign Service employees of the International Communication Agency (ICA), formerly the United States Information Agency (USIA); for all Civil Service and Wage Grade employees of the ICA and the Agency for International Development; and for a significant proportion of the Civil Service and Wage Grade employees of the Department of State.

In its capacity as exclusive bargaining representative for members of the Foreign Service, AFGE negotiates personnel policies, presents grievances and carries on legislative activity to improve the welfare of employees and their ability to carry out the foreign policy objectives of the United States. Therefore, AFGE is keenly interested in the elimination of a discriminatory element of the Foreign Service system which arbitrarily excludes certain employees from service in the federal government: mandatory retirement at age sixty.

SUMMARY OF ARGUMENT

A statutory discrimination exists between Foreign Service employees and other federal employees with regard to the age at which retirement may be compelled. The district court found this discrimination to be without a rational basis and therefore in violation of the equal protection guarantees of the Fifth Amendment of the Constitution. The Government has failed to provide a

basis for reversing this finding and, indeed, has only repeated earlier unsupported statements and opinions that the nature of Foreign Service work requires an earlier mandatory retirement age. Such an unsubstantiated presentation is insufficient where, as here, the record solidly contradicts the unsupported statements and opinions. The district court properly examined the record to determine whether a factual basis exists to support mandatory retirement at age sixty as a means to ensure a high degree of competence in the Foreign Service. The court found the record to overwhelmingly rebut any contention that the stresses and conditions of Foreign Service employment require an earlier mandatory retirement age for Foreign Service employees.

The record establishes that Foreign Service employees over age sixty are no less able to serve in overseas assignments than those under sixty, and are no less able to perform than the other federal employees who serve abroad. It is obvious that the attributes necessary for competent performance in the Foreign Service are of an intellectual and psychological nature and are not of the type that naturally diminish by the age of sixty. The Government has not shown that overseas Foreign Service work is likely to become unmanageable for, or have a particular debilitating effect upon, employees who reach age sixty.

Furthermore, mandatory retirement at age sixty is not an essential element of the Foreign Service personnel system which is designed to achieve a high level of competence. The operation of the system would not be impeded in any way by eliminating this retirement age provision; the promotion and selection procedures based solely on performance would be unaffected. Any alleged reduction in the number of promotion opportunities in the Foreign Service is unrelated to the existence or nonexistence of mandatory retirement at age sixty.

The fact that the elimination of age sixty mandatory retirement could increase the number of employees competing for career opportunities is not a rational basis for the lower mandatory retirement age applicable to the Foreign Service. Enhancement of opportunities for younger employees at the expense of opportunities for older employees is not a legitimate governmental purpose, and is discrimination *per se* where, as here, no nexus has been established between diminished performance ability and age. Because the discrimination between Foreign Service employees and other federal employees with regard to a mandatory retirement age fails to rationally further a legitimate governmental purpose, the discrimination has no rational basis and is unconstitutional. The decision of the district court is correct and should be affirmed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY FOUND UPON REVIEW OF THE RECORD THAT NO RATIONAL BASIS EXISTS FOR THE DISCRIMINATION BETWEEN FOREIGN SERVICE PERSONNEL AND OTHER FEDERAL EMPLOYEES WITH REGARD TO MANDATORY RETIREMENT AGE.

The district court in this case found as a matter of fact on the basis of the record that no rational basis exists for requiring Foreign Service employees to retire at age sixty. (J.S. App. 1A-8A) The record which the court had before it "conclusively establishe[d]" (J.S. App. 5A) that other federal employees serve in difficult conditions abroad, and "convincingly" showed (J.S. App. 6A) that reaching age sixty is no bar to effective performance in government employment overseas. Absent from the record was a factual showing by the Government to counter the plaintiffs' evidence in this regard. The district court's conclusion that the age sixty mandatory retirement provision is irrational and arbitrary was therefore entirely

proper. The Government, as Appellant, has provided no basis for disturbing this conclusion and has only repeated statements and opinions for which it has provided no foundation.

It is plain that Congress may create classifications of people and accord different treatment to the different classes. However, when a statutory classification encounters an equal protection challenge the inquiry goes beyond simply whether a classification has been drawn to ask whether the classification bears a rational relationship to a legitimate state purpose. *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972). The classification must be based upon some reasonable ground. *Rinaldi* v. *Yeager*, 384 U.S. 305, 308-9 (1966). Thus, to say that Congress has established a Foreign Service and a Civil Service differing in various ways, is not to conclude that any differential treatment between Foreign Service employees and Civil Service employees is constitutional. A differential treatment must be shown to be reasonably related to the purpose of the statute which has imposed it. *Morey* v. *Doud*, 354 U.S. 457, 465 (1957).

The Government has asserted that the legitimate purpose served by requiring Foreign Service employees to retire at age sixty is that of "maintaining a competent and professional diplomatic corps." (Brief for Appellant at 9). This is certainly a laudatory objective. However, the Government must go beyond merely articulating its purpose to establish by the record the manner in which it is "rationally furthered" by the age sixty mandatory retirement provision. *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976).[1] In *Murgia*, this

[1] That judicial inquiry is to be made into the relation between a legislative purpose and the means chosen to achieve that purpose seems clear. In the case of *Trimble* v. *Gordon*, —— U.S. ——, 97 S. Ct. 1459 (1977), this Court found a constitutional analysis to be "incomplete" (at 1464) which did not address the relation between the challenged statute and the asserted governmental interest. *See*

Court examined the record for the factual basis supporting a mandatory retirement provision for uniformed police officers. Note was taken of the findings of a special legislative commission that there existed a perceptible diminution by age fifty-five in the physical strength required for uniformed police work. Attention was given to the testimony of expert witnesses on the effect of the physically demanding work and continued ability to perform. By examining the record, the Court agreed that uniformed police work is physically strenuous and that strength as well as stamina decrease with age. Thus, the Court reached the conclusion that the provision for mandatory retirement at age fifty-five rationally furthered the State's purpose. That the evidence and the actual circumstances of uniformed police work were examined demonstrates that the Court's conclusion was not based upon bare statements either of the legislature or of the Board of Retirement.[2] It illustrates that even under the rational basis test there is "bite in the Equal Protection Clause".[3]

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also, Eisenstadt v. *Baird*, 405 U.S. 438, 447 (1972); *Jimenez* v. *Weinberger*, 417 U.S. 628, 636 (1973); *Reed* v. *Reed*, 404 U.S. 71, 75-6 (1971).

[2] That the decision in *Murgia* was based on evidence in the record was the conclusion of the Seventh Circuit in *Gault* v. *Garrison*, 569 F.2d 993, 995-6 (1977). In that case the court examined and distinguished the situation of teachers from that of uniformed police finding "mental skills" more important than "physical ability." (at 996) The court also found no "life and death" factor should a teacher become unable to function properly, as might exist with a police officer.

[3] Gunther, *The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine in a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 18-19 (1972).

II. THE RECORD FAILS TO ESTABLISH THAT FOREIGN SERVICE EMPLOYEES OVER AGE SIXTY ARE LESS ABLE TO PERFORM COMPETENTLY AND PROFESSIONALLY THAN THOSE UNDER SIXTY OR THAN OTHER FEDERAL EMPLOYEES OVER AGE SIXTY WHO SERVE ABROAD.

The Government has asserted that the stresses and conditions of overseas Foreign Service life diminish the ability to work past age sixty so as to justify a mandatory retirement age lower than that which applies to other federal employees. It has failed, however, to build a record which supports this assertion. While relying on *Murgia*, *supra*, the Government has not even approached the kind of factual showing that was made by Massachusetts in that case. It cannot suggest that Foreign Service work is physically strenuous, involves protection of the public, or requires that employees carry weapons to subdue dangerous persons. Obviously, Foreign Service employment is of a different character. The attributes critical to good performance are adaptability, sensitivity to other cultures, intelligence, mature judgement, and the ability to synthesize and communicate ideas. These are characteristics which, the record establishes, have no correlation with youth; they are not attributes likely to diminish after one reaches age sixty. The affidavits introduced below by the plaintiffs, reveal that older people adapt as well to overseas life as younger ones, and are no more likely to contract debilitating diseases or to suffer medical problems.[4] They suggest that some of these factors are actually more of a problem for young inexperienced employees with small children.[5] The affidavits also reflect that intelligence and good judgement

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[4] English Aff. para. 3 (R-42); Munzer Aff. para. 2 (R-33); Barrall Aff. para. 2-4 (R-29); Kessler Aff. para. 2-3 (R-42).

[5] Barrall Aff., *id.*

are demonstrated by employees of all ages,[6] and that the communication and representational activity performed by older persons is most effective.[7] In fact, the record establishes what common sense dictates: that Foreign Service employees are wiser in handling overseas life and better equipped to perform their duties after gaining the maturity and experience that come with age. The Government has simply failed to show that overseas Foreign Service work is likely to become unmanageable for, or to have a particular debilitating effect upon, Foreign Service employees who reach age sixty.

As the lower court found (J.S. App. 5A), some 55,000 non-Foreign Service federal employees work overseas without being subject to mandatory retirement at age sixty. Evidently no special retirement provision was considered by Congress for these overseas Civil Servants. This may be due to the absence of the "mystique" which surrounds the Foreign Service. However, "mystique" alone cannot support a legislative discrimination between Foreign Service employees and Civil Service employees with regard to a mandatory retirement age. The argument that age sixty mandatory retirement relates to long years of overseas work is contradicted by the fact that the group of employees most recently brought under the Foreign Service Retirement System does not, in fact, serve abroad. The Foreign Affairs Specialist (FAS) programs instituted in the early nineteen seventies by the State Department and USIA (ICA) involved the conversion to the Foreign Service of the whole gamut of employees assigned permanently to Washington: personnel officers, data processors, television technicians, translators, attorneys, radio broadcasters, etc. Most FAS employees are indistinguishable from Civil Servants except in the way in which they are promoted and retired. FAS

[6] Barrall Aff. para. 2 (R-29).

[7] English Aff. para. 3 (R-42); Fox Aff. para. 2-3 (R-42).

employees were made subject to mandatory retirement at age sixty over a period of several years.[8] Recently, USIA (ICA) discontinued the FAS program and instituted a Revised Personnel System based upon the principle of separate overseas and domestic services. The new domestic service, containing both Civil Service and FAS employees, operates under Civil Service procedures in assignment and promotion. Yet, domestic service FAS employees, who are not subject to overseas assignment, continue to participate in the Foreign Service retirement system.[9]

III. MANDATORY RETIREMENT AT AGE SIXTY IS NOT AN ESSENTIAL ELEMENT OF THE FOREIGN SERVICE PERSONNEL SYSTEM WHICH IS DESIGNED TO ACHIEVE A HIGH LEVEL OF COMPETENCE.

An impression has been made that the suspension of mandatory retirement as a result of the district court's decision has created a nearly insurmountable barrier to upward movement in the Foreign Service, and that this Court's affirmance of that decision will mean the end of the Foreign Service system as presently designed. The truth of the matter is that there is a long and tortuous history of problems in the Foreign Service, pre-dating this litigation, which has made upward mobility on the basis of merit more difficult. These numerous and complex problems have been both internally produced and ex-

[8] Legislative authority for the FAS programs is contained in Pub. L. 90-494, 82 Stat. 814, 22 U.S.C. § 931. Inclusion in the Foreign Service Retirement System is provided for in *id.*, § 9(c), § 16(a), 22 U.S.C. § 1229(c), § 930(a). Regulations governing the FAS program in USIA (ICA) are contained in USIA Manual of Operations and Administration, V/A-V/B § 1000, and USIA Circular 411D and 414F (August 31, 1973).

[9] Regulations outlining the new Revised Personnel System are contained in USIA Circular 487D and 486F (December 19, 1977).

ternally imposed. Though well documented in official reports [10] and Congressional records, the problems have been ignored in the presentations of the Government and the American Foreign Service Association (AFSA).

The absence of voluntary retirements in the Foreign Service during the last year has been attributed here to the district court's decision. However, in testimony to Congress [11] and in communications to the public [12] the Government and AFSA have acknowledged that, in fact, the cause is the long-delayed increase in the federal salary ceiling which occurred in early 1977: senior officers whose pay had been frozen at $36,000 suddenly received a raise to $47,500. Since one's retirement annuity is normally figured on the three highest salary years, the salary increase created a compelling reason for officers to delay retirement until 1980 so as to enjoy the full benefit of the pay increase. Congress in response is considering a special retirement provision allowing senior employees to retire on the basis of a single highest salary year until 1980. The legislative history makes it clear that the source of the recent retirement problem in the Foreign Service is the executive pay increase and not this litigation.[13]

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[10] *See, e.g.*, Report of the Commission on the Organization of the Government for the Conduct of Foreign Policy (1975); Report of the Secretary's Committee on Personnel, Toward a Stronger Foreign Service (June 1, 1954).

[11] *Foreign Relations Authorization for Fiscal Year 1979: Hearings Before the Subcomm. on International Operations of the House Comm. on International Relations*, 95th Cong. 2d Sess. 10, 215 (1978) (statement of Harry G. Barnes, Jr.) (statement of Lars H. Hydle).

[12] Department of State Newsletter, Dec., 1977 at 48-49; Foreign Service Journal, Aug., 1978, at 46.

[13] *Foreign Relations Authorization Act, Fiscal Year 1979: Report on S. 3076 of the Senate Comm. on Foreign Relations*, Rep. No. 95-842, 95th Cong., 2d Sess., 25 (1978).

Great emphasis has been given to the argument that the suspension in the Foreign Service of mandatory retirement at age sixty has seriously reduced the number and frequency of promotions and will continue to do so by nullifying a well-designed system of "up and out." However, the problem of declining promotions is not new [14] and has many causes. In order to understand them it is necessary to know something about the way in which promotion opportunities in the Foreign Service are determined. Essentially what is involved is a comparison between the number of officers of a certain rank with the number of positions at the next higher rank. The number of positions is determined administratively, not by statute, and is based on a number of factors: budget, classification structure, staffing patterns, etc. Vacancies for the upcoming year are projected and eventually a number of promotion "opportunities" is established for each rank. The Secretary of State and Director of USIA (ICA) retain the discretion to further modify these numbers.[15] Major cuts in the Foreign Service budget ordered by both the Office of Management and Budget and the Congress, have substantially reduced the number of Foreign Service positions during the last decade. Budget restrictions have also led the agencies to downgrade or eliminate higher ranked positions, and to limit the number of promotions allowed to the higher salaried ranks. Given the operation of the system, the inability of higher level employees to move up has meant not only fewer promotions to the higher ranks but also reduced mobility for middle and junior level employees. To exacerbate the situation both USIA (ICA) and the De-

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[14] *News and Views* (Newsletter of American Federation of Government Employees, Local 1812), February 28, 1974, in which the serious decline in promotions for ranks 3, 4, and 5 in the years 1970 to 1973 was noted.

[15] Section 623, Foreign Service Act of 1946, 60 Stat. 1014, as amended, 22 U.S.C. § 993.

partment of State engaged in excessive overgrading of positions thereby creating a scarcity of jobs in the middle grades to which junior officers could be promoted.[16] Further problems affecting promotions have stemmed from political patronage appointments in the Department of State and USIA (ICA) made under the "reserve" authority of the Foreign Service Act,[17] and under Schedule "C" of the Civil Service system.[18] This method of filling positions reduces the number of advancement opportunities for career employees. Finally, promotions were curtailed during the years from 1973 to 1977 after certain aspects of the selection-out process were held unconstitutional by court decision.[19] Delay by USIA (ICA) and the Department of State in implementing the decision, meant that selection-out did not function for a substantial period.[20]

In light of these and other problems it is understandable that dissatisfaction with the rate of promotion and lowered morale could arise in the Foreign Service. However, the existence or non-existence of mandatory retirement at age sixty is irrelevant to this condition. If there

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[16] Civil Service Commission, Report on Personnel Management at the Dept. of State, 1975; USIA, Report of a Task Force Study of USIA, 1975-76. The USIA report concluded that as a result of overgrading the Agency was unable to provide "proper developmental opportunities for its lower grade officers" (at 9).

[17] Section 522, Foreign Service Act of 1946, 60 Stat. 1009, as amended, 22 U.S.C. § 922. Appointment of reserve officers is made without usual examination, for periods not to exceed five years.

[18] 5 C.F.R. § 213, §§ 3301-99 (1977).

[19] *Lindsay* v. *Kissinger*, 367 F.Supp. 949 (D.D.C. 1973).

[20] There were no selections-out from 1973 to 1976. Def. Ans. to Pl. Amended First Interrog. No. 2 (R-49); *Foreign Relations Authorizations for Fiscal Year 1977: Hearings Before the Subcomm. on International Operations of the House Comm. on International Relations*, 94th Cong., 2d Sess., 143 (1976) (letter from Carol C. Laise to Representative Leo J. Ryan).

is declining competence in the Foreign Service, or a forecast of such, it is attributable to other causes. There should be little concern about the prospect of retaining a number of employees who, at the age of sixty, have survived rigorous entry examinations, biennial medical check-ups, annual evaluation and selection board review, selection out, disability retirement, and still wish to continue working. The Government can only speculate on the effect of eliminating mandatory retirement at age sixty. If the rest of the federal sector is a valid point of reference, the effect will be *de minimus*.[21] The Department of State's own figures suggest as much: it is reported that Foreign Service employees on the average have been retiring at the age of fifty-five.[22] Other information recently presented to Congress supports the projection of a *de minimus* effect:

> The trend in recent times has been toward early retirement. In 1974, 72 percent of all Social Security retirees opted for reduced benefits with age 62 as the overwhelmingly most common age. . . . At Connecticut General Life Insurance Co., which recently eliminated compulsory retirement two of 50 retiring employees decided to stay on in 1977.
>
> A recent Roper poll found that nearly two-thirds of Americans would like to retire before age 62 and over one-third of Americans would like to retire before reaching 60.

Retirement Age Policies (Part 1): Hearing Before the House Select Committee on Aging, Comm. Pub. No. 95-

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[21] According to the United States Civil Service Commission Preliminary Report on Civil Service Retirement (Fiscal Year 1977), only two percent of federal workers were mandatorily retired at age seventy in 1977. The report projects no major impact on the Federal Service from eliminating compulsory retirement age and no detrimental effect on the employment of younger people.

[22] *Federal Times—Retirement Supplement*, Oct. 17, 1977, at R-1, Col. 1.

88,' 95th Cong., 1st Sess., 31 (1977). (Statement of Senator Jacob Javits).

In any case, the Government maintains that early retirement is inextricably intertwined with the operation of the selection-out procedure and is necessary for its proper functioning.[23] We fail to see why this is true. Selection-out for "time-in-class" is the only form of selection-out related to the rate of promotion, rather than to substandard performance. Time-in-class periods are not set by statute, but are established administratively.[24] They can be, and are, changed periodically to adjust to new circumstances. There is no basis in the record upon which to argue that as an essential component of the selection-out procedure, mandatory retirement at age sixty in some way maintains a "balance" in the Foreign Service which promotes competence. Eliminating age sixty mandatory retirement would improve the demographic balance of the Foreign Service and might, for that very reason, increase its effectiveness. In recent years the foreign affairs agencies have made it a priority to achieve a more representative character.[25]

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[23] The Government has also characterized the plaintiffs as seeking to "improve their lot" (Brief for Appellant at 34) by challenging one aspect of a personnel system that allegedly benefits them in ways that the Civil Service system would not. This characterization is unfair in several respects. First, as to whether the Foreign Service Retirement System is "better" than the Civil Service System, opinions vary and depend essentially on personal preference. Second, whatever the relative merit of the two systems, this issue is irrelevant to the case at hand. The Government has cited no authority for its argument for a "Foreign Service employment 'package' " (*id.*, at 35).

[24] Section 633(a) Foreign Service Act of 1946, 60 Stat. 1015(a), as amended, 22 U.S.C. § 1003.

[25] *Foreign Relations Authorization for Fiscal Year 1979: Hearings Before the Subcomm. on International Operations of the House Comm. on International Relations*, 95th Cong., 2d Sess., 9 (1978) (statement of Harry G. Barnes, Jr.).

One might conclude from the Government's presentation that eliminating an earlier mandatory retirement age for the Foreign Service will result in an undesirable entrenchment of older officers. Such a conclusion would be erroneous. Foreign Service employees regularly rotate between assignments, and an agency may reassign an employee at any time in the interests of the Service.[26] Extensions of normal tours of duty are within the sole discretion of the agency. Furthermore, employees not only rotate between foreign posts and Washington assignments; they are also assigned to other federal agencies[27] and to state, county or municipal governments and private organizations.[28] Thus, Foreign Service employees regularly receive new positions in new environments. They remain in one position only by management decision. In addition to rotating assignments, Foreign Service employees may receive university training at agency expense (Section 573, Foreign Service Act of 1946, 60 Stat. 1012, as amended, 22 U.S.C. 963) or sabbatical leave for educational purposes. Training is given on a continuing basis by the Foreign Service Institute, including intensive language instruction preceding overseas assignment. In the course of a career, therefore, a Foreign Service employee has a broader and more varied experience than is expected of a Civil Servant. Because of this characteristic, Foreign Service employees are much less likely to become rigid or entrenched after many years of service than those in the Civil Service who may work beyond age sixty.

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[26] Section 514, Foreign Service Act of 1946, 60 Stat. 1008, as amended, 22 U.S.C. 909.

[27] Section 571, *id.*, 60 Stat. 1011, as amended, 22 U.S.C. 961.

[28] Section 576, *id.*, 88 Stat. 1440-41, as amended, 22 U.S.C. 966. The pending Foreign Relations Authorization Bill authorizes expansion of this program. *Foreign Relations Authorization Act: Fiscal Year 1979: Report on S. 3076 of the Senate Comm. on Foreign Relations*, Rep. No. 95-842, 95th Cong., 2d Sess., 12-14 (1978).

Conditions in the Foreign Service have changed since Congress established the earlier mandatory retirement age. Not only have living conditions abroad generally improved, but also life expectancies have lengthened. The traditional notion of an "elite" service has undergone change as well. Groups generally unrepresented in the Service in the past, such as women and racial minorities, are now employed and actively recruited.[29] Regular and mandatory rotations to the United States have lessened the degree of isolation. There is a smaller number of positions overseas[30] as well as an increasing preference among younger officers to spend more time in Washington.[31] And, a workforce that was once viewed as serving solely at the pleasure of the President, has achieved collective bargaining rights, sharing in many decisions that at one time were within the discretion of the Depart-

[29] In a recent address on Foreign Service Day, 1978, Under Secretary of State for Political Affairs David Newsome stated, "There is a need to adjust the composition of the Service, to recognize the expanding role of women, to adjust more fairly the participation of minorities, and to take account of the changing professional requirements of our diplomacy." Department of State Newsletter, June, 1978 at 5.

[30] *Foreign Relations Authorization Act: Hearings Before the Subcomm. on International Operations of the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess., 139 (1977) (Statement of John Reinhardt); *Foreign Relations Authorization for Fiscal Year 1979: Hearings Before the Subcomm. on International Operations of the House Comm. on International Relations*, 95th Cong., 2d Sess., 214-5 (1978) (statement of Lars H. Hydle).

[31] Memorandum from William E. Carroll, Director of Personnel, to USIA Executive Comm. (March 19, 1975). "Another significant change is the very strong general preference for more and longer assignments in the U.S. A few years ago, most officers wanted to remain overseas as long as possible. Today, a large number of officers want to return to the U.S. before completing the seven-to-ten years overseas that our assignment policy generally requires. This trend is most pronounced among junior and younger mid-grade officers." *id.*

ment.[32] Any basis for mandatory retirement at age sixty must be rational in terms of these present day conditions. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 153 (1938).

IV. STANDING ALONE, THE ENHANCEMENT OF PROMOTION OPPORTUNITIES FOR YOUNGER FOREIGN SERVICE EMPLOYEES CANNOT SERVE AS A RATIONAL BASIS FOR MANDATORY RETIREMENT AT AGE SIXTY.

The Government contends that there is a rational basis for a lower mandatory retirement age for the Foreign Service in the fact that it affords greater opportunities for younger officers to advance. The record fails to show, however, that such an effect in any way relates to maintaining a highly competent and professional diplomatic corps. On the contrary, the record establishes that the quality of the Foreign Service does not depend upon the absence of employees over the age of sixty; the record rebuts any notion that younger officers necessarily perform better than older ones. Without a clear nexus between diminished performance ability and age, the purpose of enhancing promotion opportunities for younger employees at the expense of older ones is patently discriminatory. The lower court so found. (J.S. App. 4A) The public policy behind the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. §§ 621, *et seq.*, and similar state enactments indicates that conclusions about employee ability should not be based solely on age. While there may be no "fundamental right" to employment, the courts have treated employment as an important aspect of the "liberty" and "pursuit of happi-

[32] Executive Order No. 11636, 36 Fed. Reg. 24901, *reprinted in* 22 U.S.C. § 801 (effective December 17, 1971) gave collective bargaining rights to members of the Foreign Service.

ness" protected by the Constitution.[53] Thus, employment should not be made less available to one class of persons than another without some legitimate purpose being served.[54] Foreign Service employees age sixty and above should not suffer termination of their employment due to unsubstantiated views on the effects of age on their performance.

As artificial barriers of race, sex and age are eliminated from the Foreign Service, more employees will be competing for the same number of positions and opportunities. For some, this will do violence to the traditional concept of an "elite corps". In truth, however, the Foreign Service will benefit from the diversity in background and experience of its employees. The high level of competence will be maintained because competition will take place upon the one basis in which all are potentially equal, that is, ability. The foreign affairs of the United States will be conducted by a skillful and dedicated diplomatic corps which is itself founded on rational principles consistent with the Constitution.

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[53] *Perry* v. *Sindermann*, 408 U.S. 593, 601 (1972), *Board of Regents* v. *Roth*, 408 U.S. 564, 572 (1972).

[54] This court has rejected the notion that work is less important for women than for men and has struck down discrimination based on this premise. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 643 (1975).

CONCLUSION

For the reasons stated the judgment of the district court should be affirmed.

Respectfully submitted,

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